Supreme Court, U. S.
FILED
JAN 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1050

RUSSELL CHARLES HUDLER,
Petitioner,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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No.

RUSSELL CHARLES HUDLER,
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v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Russell Charles Hudler, prays for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 1a) is not yet reported. This is a criminal case which was tried to a twelve-person jury in the District Court, and thus, there is no lower court opinion.

JURISDICTION

The Court of Appeals entered judgment on November 5, 1979.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the term "false or fraudulent" under 26 U.S.C. § 7205 requires an element of deceptiveness.

(2) Whether under the circumstances of this case the inherent confusion and contradiction in the federal income tax withholding scheme precludes the required finding of "willfulness" for a conviction under the criminal tax statutes.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on two counts of having willfully supplied false or fraudulent information relating to federal withholding tax for 1977 in violation of 26 U.S.C. § 7205. Petitioner was sentenced to one year imprisonment on the first count and to two years probation on the second count. The Court of Appeals for the Tenth Circuit affirmed.

Petitioner is an elevator repairman who worked for two companies during 1977. After his attempt to furnish a Form W-4E ("Exemption from Withholding") was rejected, he furnished his employers with W-4 forms with the figure "99" in the spaces provided for reporting the number of withholding exemptions.

The primary defense raised at trial was the following:

(1) Petitioner believed that his wages were exempt from the requirement of withholding under the Internal Revenue Code because he was a member of a religious order performing duties required by the order; such wages are specifically excepted by statute (26 U.S.C. § 3401[a][9]), and therefore, petitioner held an honest belief that he was in compliance with the law.

(2) Petitioner understood that it was appropriate to indicate this exemption by writing "99" in the space provided for the number of withholding allowances on his Form W-4. He had learned these beliefs from his church superiors and from his reading of Internal Revenue Service documents.

The government prosecuted the case on the theory that the petitioner held no honest belief in his claimed exemption. There is no dispute that petitioner used the figure "99" as a "code" to stop withholding.

The primary issue before the Court of Appeals concerned the trial court's instructions to the jury. The defense contention was that the trial court misconstrued the element of "willfulness" under 26 U.S.C. § 7205, and consequently misinstructed the jury. The trial court's instructions focused the jury's deliberations on whether the petitioner honestly believed he was entitled to precisely ninety-nine withholding exemptions (as defined in 26 U.S.C. § 3402[m]), rather than on whether the petitioner honestly believed he was exempt from federal withholding. The trial court refused to give defense-requested instructions which focused on whether petitioner honestly believed he was exempt. The court instructed the jury to consider

whether the petitioner believed that he had reported the *precise number of withholding allowances*[1] rather than, as the rejected defense instructions framed the issue, whether the petitioner believed his W-4 would result in the *proper amount of withholding*.[2] The jury

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[1] The trial court gave the following jury instruction:

"If you find that the defendant in good faith believed that the Form W-4, Employee Withholding Allowance Certificate, as prepared by him truthfully reported the number of allowances he is entitled to claim under the internal revenue laws, he cannot be guilty of willfully supplying false or fraudulent information in the certificate.

"However, the offense is committed if you find that the defendant did not in good faith believe that the W-4 prepared by him truthfully reported the number of allowances, but rather you find that the defendant knew the Form W-4 as prepared by him falsely or fraudulently reported the number of allowances to which he was entitled and that he so prepared it with the intent to prevent the proper withholding and collection of his federal income taxes."

[2] The trial court refused to give the following defense-requested instructions:

(a) "The defendant in this case has testified that he believed himself to be exempt from withholding requirements because he was a member of a religious order performing services required by the order. If you find that the defendant held that belief honestly then you must find the defendant not guilty.

(b) "If you find the defendant intended to figure 99 only to be a mechanism to claim exemption or code to cause zero withholding, then you must decide whether zero withholding was false or fraudulent rather than deciding whether 99 was false or fraudulent.

(c) "The information furnished by the defendant was false if and only if it resulted in incorrect withholding amounts. It was fraudulent if and only if the defendant intended to deceive, that is to cause zero withholding. Therefore, the information in this case was false if his proper withholding liability was greater than zero at the time he furnished the information. It was fraudulent only if, knowing his withholding liability to be greater than zero, he furnished information which he intended to cause zero withholding.

(d) "If you find the defendant in good faith believed that Form W-4, Employee Withholding Allowance Certificate, as prepared by him would result in correct withholding amounts, he cannot be guilty of willfully supplying false or fraudulent information in the certificate."

was not asked to decide whether he held his belief that he was exempt in good faith.

The Court of Appeals affirmed the conviction on the ground that the instructions given by the trial court were an accurate statement of the applicable law. In so doing, the Court held that "false" and fraudulent" under 26 U.S.C. § 7205 "does not require that a statement be 'false in the sense of deceptive,' " rejecting the Fourth Circuit Court of Appeal's definition in *United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974). The Court agreed with the trial court's jury instruction that a violation of 26 U.S.C. § 7205 occurs when an employee supplies false or fraudulent information when he furnish a Form W-4 to his employer "with the specific intent to interfere with the withholding and collection of his federal taxes," agreeing with the Eighth Circuit Court of Appeals in *United States* v. *Hinderman*, 528 F.2d 100, 102 (8th Cir. 1975).

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit holding below is in conflict with the Fourth Circuit's decision in *United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974). The Fourth Circuit Court of Appeals has held that "false or fraudulent" in 26 U.S.C. § 7205 implies an element of deceptiveness:

> "[W]e hold that in order for a taxpayer to be convicted of supplying 'false or fraudulent' infor-

> mation contrary to section 7205 the information must either be (1) supplied with intent to deceive, or (2) false in the sense of deceptive—of such a nature that it could reasonably affect the withholding to the detriment of the government." *United States* v. *Snider*, 502 F.2d 645, 655 (4th Cir. 1974).

The Internal Revenue Service itself has issued Regulations which embody the Fourth Circuit's analysis. Regs § 31.3402(F)(2)-1(e) requires that any withholding exemption certificate indicated to be false by an employee is *invalid*. An invalid withholding exemption certificate shall be considered by the employer as a nullity for purposes of computing withholding. Such an invalid certicate is distinguished from a certificate which is valid on its face, but which the employer has reason to believe may be false. Thus, the Regulation indicates that a withholding certificate which is technically false, but which cannot reasonably affect the withholding system is to be considered a nullity.

Both Regs. § 31.3402(f)(2)-1(e) and the Fourth Circuit's analysis lead to the conclusion that 26 U.S.C. § 7205 is designed to punish the deceitful taxpayer. 26 U.S.C. § 7205 is properly viewed as condemning the W-4 certificate which, although apparently valid is, in fact, latently false.[a]

[a] Regs. § 31.3402(f)(2)-1(e) was promulgated July 26, 1976, which was prior to the activities alleged in Count II of the Information in this case. The activities alleged in Count I occurred before the promulgation of the Regulation. The rationale and reasoning of the Regulation, however, are valid regardless of its formal adoption date and, therefore, lead to the same conclusion for both Counts of the Information. The Regulation is still in force.

II. The decision of the Court of Appeals is in conflict with this Court's decision in *United States* v. *Pomponio*, 429 U.S. 10 (1976). If left standing, the decision will adversely affect the administration of the Internal Revenue laws by undermining the taxpaying public's respect for the integrity of the tax system.

A. 26 U.S.C. § 7205, as well as several other criminal sanctions in the federal tax law require "willfulness". This Court has defined "willfulness" as a "voluntary, intentional violation of a known legal duty." *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976). The opinions in *Pomponio* recapitulated the Court's discussion in *United States* v. *Bishop*, 412 U.S. 346 (1973), regarding the legal meaning of "willfulness," but even more heavily stressed the intentional, knowing aspect of willfulness. "[Willfulness] requires more than a showing of careless disregard for the truth." *United States* v. *Pomponio*, 429 U.S. 10, 12. In footnote 3 to the opinion, this Court expressly rejected the view that the requirement of willfulness could be satisfied by even an unreasonable, capricious, or careless disregard for truth or falsity. *United States* v. *Pomponio*, 429 U.S. 10, 12.

In the present case, the Tenth Circuit has followed the law of the Eighth Circuit which has held that the intent necessary for a violation of 26 U.S.C. § 7205 is:

> "The intent to interfere with the withholding system and prevent the collection of taxes in the manner prescribed by law." *United States* v. *Hindermann*, 528 F.2d 100 (8th Cir. 1975).

"Willfulness" must be included within this definition because of the language of 26 U.S.C. § 7205. "Intent" under the Tenth Circuit's definition has to be viewed, in

light of *Pomponio,* as an intentional interference with the federal withholding system as understood by the taxpayer. In order to be convicted under the statute, petitioner must be found to have intended to prevent the "proper" withholding *as he understood it to be.*

In the present case, statutory vagueness in the law of federal income tax withholding negates willfulness if petitioner honestly believed that he was exempt under the withholding provisions relating to members of religious orders. 26 U.S.C. § 3401(a)(9). The jury was never asked to decide whether he held his belief that he was exempt in good faith, as requested by the defense.

1. Confusion Is Inherent In The Law Of Federal Income Tax Withholding Regarding Who Is Exempt And Which Activities Are Authorized.

26 U.S.C. § 3401 defines the term "wages" for the purpose of federal income tax withholding. It specifically excepts remuneration paid for services performed by a member of a religious order in the exercise of duties required by such order. I.R.C. § 3401(a)(9). The only reference to this statutory provision contained in the Regulations is the following:

> "Service performed by a member of a religious order in the exercise of duties required by such order includes all duties required of the member by the order. The nature or extent of such services is immaterial so long as it is a service which he is directed or required to perform by his ecclesiastical superiors." Regs. § 31.3401(a)(9)-1(d).

On its face, these provisions provide that if a member of a religious order is directed by his superiors to work and turn over his remuneration to the religious order,

then that remuneration is exempt from federal income tax withholding.

The Internal Revenue Service has issued several Revenue Rulings in an attempt to clarify its position regarding the operation of I.R.C. § 3401. Rev. Rul. 68-123, 1968-1 C.B. 35; Rev. Rul. 76-323, 1976-2 C.B. 18; and Rev. Rul. 77-290, 1977-2 C.B. 11. The Internal Revenue Service has attempted to develop an approach to make distinctions in this complicated area between two types of services required by a religious order of its members. It has taken the position that certain types of employment give rise to remuneration treated as exempt from income and employment taxation, while certain other types give rise to remuneration treated as received by the member and contributed to the religious organization, and is, therefore, subject to taxation. These distinctions are subtle even to the most legally sophisticated. The problem is further compounded by the fact that such distinctions do not appear in the withholding provisions of the Internal Revenue Code, in the Treasury Regulations relating to those provisions, or in the Internal Revenue Service publications available to the general public. Furthermore, both Rev. Rul. 76-323 and Rev. Rul. 77-290 were promulgated after the alleged criminal violations in this case.

The uncontradicted evidence at trial showed that petitioner relied upon two specific Internal Revenue Service publications: "Circular E, Employer's Tax Guide" and Publication 517. "Circular E" provides that:

> "Members of religious orders who have taken a vow of poverty, performing duties required by the order are exempt from federal income tax withholding, exempt from social security, and exempt from federal unemployment tax."

"Publication 517," relating to social security taxes withheld from wages, contains a specific section on its front page entitled "Members of Religious Order." Relevant sections under this heading provide that:

> "A member of a religious order who has taken the vow of poverty is automatically excluded from coverage. You need not file any applications to receive the exemption . . . . Services performed by you as a member of a religious order in the exercise of duties required by the order include all duties, regardless of the nature or extent, so long as it is a service that you are directed or required to perform by your ecclesiastical superiors."

Again, there is no mention of the Internal Revenue Service's distinction between exempt and non-exempt services.

Substantial statutory confusion and contradiction exist, and the Internal Revenue Service's own publications contribute to the confusion. If, therefore, a taxpayer claims in good faith to be a member of a religious order performing duties required by the order, then "willfulness" cannot exist, as a matter of law. The conclusion therefore is that the proper focus for the jury in this case should have been whether petitioner believed himself to be exempt as a member of a religious order performing duties required by the order.

2. Confusion Regarding The Method Of Claiming Exempt Status.

Significant confusion is also created by the statutory scheme concerning the proper method to claim the exemption. 26 U.S.C. § 3401(a)(9) provides for an exemption for members of religious orders, but 26 U.S.C. § 3402 does not provide any means for a taxpayer, such as petitioner, to claim the exemption. The only method

mentioned in 26 U.S.C. § 3402 for claiming an exemption from the requirements of withholding tax is 26 U.S.C. § 3402(n). This provision requires that an employee furnish a certificate (known as Form W-4E) which certifies that the employee not only anticipates that he will incur no income tax liability for the current year, but also, that he incurred no income tax liability for the preceding taxable year. An employee who believes that he is exempt for the current taxable year, although not for the prior year, is necessarily thrown into confusion.

The evidence presented at trial in this case indicates that petitioner attempted first to file a W-4E certificate with the certification that he incurred no tax liability in the preceding year stricken by pen and that this attempt to file the W-4E certificate was rejected by his employer. It was as a result of the employer's refusal to accept the W-4E certificate that petitioner inquired further of his religious superiors, and gained an understanding that the figure "99" was a code meaning "exempt."

In summary, the central focus of the jury's deliberation under *Pomponio* should have been the sincerity of petitioner's belief that he was a member of a religious order performing duties required by the order. The Tenth Circuit's affirmation of the jury instructions given in the present case, specifically with regard to "intent," does not properly take into account the willfulness requirement enunciated by this Court in *Pomponio*.

III. The Tenth Circuit's opinion disregards this Court's teaching in *United States* v. *Bishop, supra*. By allowing the conviction to stand in the present case, the Court would sanction the use of the criminal process in a matter which would more properly have been han-

dled in a civil manner. As this Court noted in *Bishop*, "[d]egrees of negligence give rise in the tax system to civil penalties." 412 U.S. at 349.

The "willfulness" requirement implements the intent of Congress to construct penalties that separate the purposeful tax violator from the "well meaning, but easily confused mass of taxpayers." *United States* v. *Bishop, supra.* The criminal sanctions in the tax area have been described as the "capstone of the system of sanctions which singly or in combination were calculated . . . to provide a penalty suitable to every degree of delinquency." *Spies* v. *United States,* 317 U.S. 492, 497 (1943); *United States* v. *Bishop, supra.*

In light of the complexity of the statutory withholding scheme, and the confusion created by the Internal Revenue Service's own interpretations and publications, allowing the criminal sanction in this case to stand will serve to undermine taxpayers' belief in the fairness and rationality of the tax system, and would serve to seriously impair the effectiveness of our voluntary compliance system of taxation.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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December, 1979

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1639

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

RUSSELL CHARLES HUDLER, *Defendant-Appellant.*

Appeal From The United States District Court
For The District Of Colorado
(D.C. No. 78 CR-86)

Stanley L. Drexler (Drexler and Wald, Professional Company; Michael J. Abramovitz and Chester J. Stern, with him on the briefs), for Appellant.

James A. Bruton (Joseph F. Dolan, United States Attorney, Richard S. Vermeire, Assistant United States Attorney, M. Carr Ferguson, Assistant Attorney General, Gilbert E. Andrews, Robert E. Lindsay, Attorneys, Tax Division, Department of Justice, with him on the briefs), for Appellee.

Before DOYLE, BREITENSTEIN and LOGAN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

After a jury trial, defendant-appellant Hudler was found guilty of violating 26 U.S.C. § 7205 by willfully supplying false information to two employers. On Count I he was sentenced to one year imprisonment and on Count II placed on probation for two years. He appeals and claims errors in the instructions and the admission of evidence. We affirm.

Section 7205, 26 U.S.C., imposes criminal penalties on any person who is required to supply information to his employer under 26 U.S.C. § 3402, and "willfully" supplies

"false or fraudulent" information. Defendant received wages for work as an elevator repair man and was required to furnish the information. The questions are whether he acted willfully and supplied false or fraudulent information.

Count I charged that defendant furnished to his employer, U.S. Elevator Company, an Internal Revenue Form W-4 on which he claimed 99 withholding exemptions. Count II was a similar charge relating to another employer, Dover Elevator Company. Defendant admits that he furnished the forms and did not have 99 exemptions. He said that he claimed them because he understood "99" to be a computer method of symbolizing tax exempt status and would result in zero withholding.

Defendant also asserted belief that he was exempt under 26 U.S.C. § 3401(a)(9) which excludes, from wages, remuneration received by an ordained minister in the exercise of his ministry and by a member of a religious order in the performance of duties required by that order.

Defendant testified that he was a minister of a church known as the Universal Sanctuary of the Association of Jesus Christ of the United States of America, the Order of Almighty God. He said that this church was a member of a larger association called Independent American Constitutional Assembly and headed by Paul Streicher who had authority over member churches. Defendant conducted religious services in his home.

Defendant conveyed all of his property to the church and took a vow of poverty. He continued his elevator repair work. His wage checks were deposited in his bank account and checked out by him or his wife. Streicher reviewed and approved all checks. Defendant's superiors told him how to stop the withholding of taxes and furnished him with IRS publications. Defendant told representatives of his employers that "99" was a code used by his group to show

that they did not believe in paying taxes, and was a computer symbol for exemption.

Defendant claims no First Amendment violation. On this appeal, he does not argue that he was actually exempt under § 3401(a)(9) but emphazise his belief in such exemption. Defendant chose to supply the W-4 form to his employers. He may not with impunity willfully use the form to furnish false or fraudulent information. See Bryson v. United States, 396 U.S. 64, 72. His claimed belief is important only in considering whether he acted willfully.

In his attack on the instructions, defendant says that they focus improperly on the number of exemptions claimed and do not present adequately his defense of belief in tax exemption. A defendant is entitled to instructions presenting his theory of the case. United States v. Von Roeder, 10 Cir., 435 F.2d 1004, 1010, cert. denied 403 U.S. 934. The exact language requested by the defendant need not be followed. United States v. Westbo, 10 Cir., 576 F.2d 285, 289. The instructions taken as a whole must give an accurate statement of the applicable law. United States v. Afflerbach, 10 Cir., 547 F.2d 522, 524, cert. denied 429 U.S. 1098.

Section 7205 proscribes the willful furnishing of a false or fraudulent statement. The court defined willfulness in terms approved by United States v. Bishop, 412 U.S. 346, 360, and United States v. Pomponio, 429 U.S. 10, 12. The court instructed:

> "An act is willfllly done if done voluntarily and intentionally and with the specific intent to do something which the actor knows the law forbids. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law. *An act intended in good faith to conform to the law is not willful.*" (Emphasis supplied.)

After stating the elements of the crime, including willfulness, the court told the jury that, to establish willfulness, it must be proved:

> "that the defendant's conduct in supplying false or fraudulent information to his employer was done *willfully with the specific intent to violate what he knew his legal duty to me.*" (Emphasis supplied.)

The instructions on willfulness were adequate. They require specific intent to violate the law and recognize a good faith defense.

The court defined properly "false" and "fraudulent" and then said:

> "* * * the government must prove that the defendant supplied the false or fraudulent information in his Form W-4, Employee Withholding Allowance Certificate, to his employers *with the specific intent to interfere with the withholding* and collection of his federal taxes in the manner prescribed by law.' (Emphasis supplied.)
>
> * * *
>
> "In considering whether the defendant furnished false or fraudulent information to his employer, you should consider the defendant's entire communication both spoken and written, not merely the Form W-4."

Defendant offered, and the court rejected, instructions that the information furnished was false only if it resulted in an incorrect withholding and fraudulent only if the defendant intended to deceive. The instructions were derived from United States v. Snider, 4 Cir., 502 F.2d 645, 655. The Eighth Circuit in United States v. Hinderman, 8 Cir., 528 F.2d 100, 102, disapproved Snider and held that § 7205 does not require that a statement be "false in the sense of deceptive." We agree with the Eighth Circuit. The criterion is not whether the employer and the government were, or could have been, deceived. The crime is the willful furnishing of false or fraudulent information.

The instructions required specific intent and permitted consideration of both the W-4 forms and defendant's statements to his employers that "99" was a symbol to indicate tax exemption. Admittedly, defendant was not entitled to 99 exemptions. He used that figure to attain zero withholding.

Defendant relies on his belief in exemption on religious grounds, his use of "99" as a symbol, and his understanding of IRS publications. These subjective factors are for jury consideration along with all evidence presented. The number of exemptions claimed is another factor. See United States v. Smith, 10 Cir., 484 F.2d 8, 10, cert. denied 415 U.S. 978, a case relating to the falsity of a W-4 form; see also United States v. Wellendorf, 5 Cir., 574 F.2d 1289, 1290, United States v. Stephen, 5 Cir., 569 F.2d 860, 861, and United States v. Arlt, 5 Cir., 567 F.2d 1295, 1298, cert. denied 436 U.S. 911, all cases relating to a claim of "99" exemptions in a W-4 form.

The instructions given permitted the jury to consider every defense offered by defendant. They were fair, adequate, clear, and understandable with no undue emphasis on any phase of the case. They permitted acquittal if the jury believed the defendant. Credibility is for the jury, and it determined the issue against the defendant.

Defendant complains of the court's exclusion of testimony of expert witness Sorenson relating to the use of "99" in computer programs to indicate tax exempt status. No showing is made that either the employers or the government knew of, or recognized, such practice. The qualifications of the witness to testify on the subject were doubtful. The court did not abuse its discretion in rejecting the testimony. Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 10 Cir., 516 F.2d 33, 37.

After the defendant's wife testified and the evidence closed, defendant offered her testimony on the retention of her separately owned property. He argues that the testimony would support his claim of sincerely held religious beliefs. The offer came too late and, at the most, was cumulative. The offer was properly rejected.

Affirmed.

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FILED
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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A) is reported at 605 F.2d 488.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1979. The petition for a writ of certiorari was filed on January 3, 1980.[1] The juris-

[1] Petitioner did not file a petition for rehearing in the court of appeals or an application for an extension of time within which to seek certiorari. The petition is therefore out of time under Rule 22(2) of the Rules of this Court.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury as to the meaning of "false or fraudulent" information under 26 U.S.C. 7205.

2. Whether the trial court correctly instructed the jury with respect to the "willfulness" element of the crime charged under 26 U.S.C. 7205.

STATUTE INVOLVED

26 U.S.C. 7205 provides as follows:

> Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on two counts of willfully filing false or frauduient Employee's Withholding Allowance Certificates (Form W-4) with his employers, in violation of 26 U.S.C. 7205. The trial court sentenced him to a one-year prison term on the first count, followed by a two-year period of probation on the second count

(Pet. App. 1a). The court of appeals affirmed (Pet. App. 6a).

The evidence at trial established that in March 1976 petitioner was employed by United States Elevator Company as an elevator mechanic (III R. 13, 22).[2] After unsuccessfully attempting to claim that he was entirely exempt from federal withholding taxes,[3] petitioner filed an Employee Withholding Allowance Certificate (Form W-4) with his employer claiming 99 allowances.[4] When petitioner submitted the form to his employer, he told the payroll clerk

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[2] "R." refers to the nine-volume record in the court of appeals.

[3] Petitioner began his employment with United States Elevator in 1974. At that time, he filed with the company a Form W-4 claiming four withholding allowances. Early in 1976, petitioner attempted to revoke his previous claim of four allowances by filing a Form W-4E, Employee's Withholding Exemption Certificate, which claimed that he was exempt from any withholding tax liability. However, his employer refused to accept the form because petitioner had altered the form by crossing out part of the required certification (26 U.S.C. 3402(n)(1)) that he had incurred no income tax liability for his preceding taxable year (III R. 24-25).

[4] Pursuant to 26 U.S.C. 3402(f)(1), employees receiving wages are permitted to claim a variety of withholding "exemptions," such as a personal exemption, dependency exemptions, old age exemptions and blindness exemptions. Moreover, under 26 U.S.C. 3402(m), employees are permitted to claim withholding "allowances" based upon excess estimated itemized deductions. The Forms W-4 filed by petitioner referred to both the statutory exemptions and allowances as "allowance." We therefore use the term "allowances" to refer to both the statutory exemptions and allowances in Section 3402.

"* * * that he did not believe in paying taxes" and that "[i]t was unconstitutional to have to pay taxes" (III R. 27). He told the clerk that he had been meeting with a group, where he learned that it was unconstitutional to pay taxes (III R. 27-28) and that "99 is a code our group is using to show that we do not believe in paying taxes" (III R. 33). When he submitted the form he did not claim to belong to any church or religious order (III R. 28). The company accepted petitioner's Form W-4 and stopped withholding federal taxes from his salary (IV R. 206).

In November 1976, petitioner left United States Elevator and accepted similar employment at Dover Elevator Company (III R. 39), with which he filed another Form W-4 claiming 99 withholding allowances. He told the payroll clerk at Dover Elevator that the number 99 was a "computer figure" to "exempt him from withholding" (III R. 44). He provided additional documents, which purported to support his claim that he was a member of a religious order and was therefore exempt from withholding tax liability (III R. 69-70). On the basis of petitioner's representations, Dover Elevator did not collect withholding taxes from his salary (III R. 72). Expert testimony established that petitioner, whose gross income was between $15,000 and $35,000 in 1976, would have needed approximately $71,650 of "determinable" itemized deductions in excess of the standard deduction properly to claim 99 withholding allowances (IV R. 142-144). An analysis of petitioner's financial records showed that petitioner's allowable deductions for 1976 did not remotely approach the amount needed properly to claim 99 allowances. Other evidence established that although petitioner had filed income tax returns and paid taxes in the past, he filed no returns and paid no taxes for 1976 and 1977 (IV R. 121-122; V R. 21-22).

Petitioner testified that in 1974 he became a minister of a church known as the Universal Sanctuary of the Association of Jesus Christ of the United States of America, the Order of Almighty God, and that he conducted religious services in his home (Pet. App. 2a). He claimed that he conveyed all of his property to the church and took a vow of poverty, while he continued to work as an elevator mechanic and continued to receive salary checks from his employer (*ibid.*). His defense was that he believed that he was entitled to claim a minister's exemption from withholding taxes (26 U.S.C. 3401(a)(9)), and that he believed that his claim of 99 withholding allowances was the proper way to obtain the exemption (Pet. App. 3a).

ARGUMENT

1. Petitioner claims (Pet. 5-6) that the district court erred in instructing the jury as to the meaning of "false or fraudulent" information under 26 U.S.C. 7205.[5] He argues that the jury should have been

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[5] The district court instructed the jury as follows (VII R. 43):

> Information is false if it was untrue when made and was then known to be untrue by the person then supplying the information or causing such information to be

instructed to "decide whether zero withholding was false or fraudulent rather than deciding whether 99 was false or fraudulent" (Pet. 4 n.2). In petitioner's view, the government was required to prove not only that the information supplied by him to his employers was false or fraudulent but also that it would have resulted in incorrect withholding by the employer.

Contrary to petitioner's claim, the statute under which he was charged—26 U.S.C. 7205—has little bearing upon the correctness of the amount of tax withheld by the employer. As the court of appeals correctly held, "[t]he crime is the willful furnishing of false or fraudulent information" by the employee (Pet. App. 5a). Accord: *United States* v. *Smith*, 487 F.2d 329, 330 (9th Cir. 1973); *United States* v. *Malinowski*, 347 F. Supp. 347, 352 (E.D. Pa. 1972), aff'd, 472 F.2d 850 (3d Cir.), cert. denied, 411 U.S. 970 (1973). Indeed, the language of 26 U.S.C. 7205 shows that the government is required to prove only

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filed. Information is fraudulent if it is supplied or caused to be supplied with the intent to deceive.

The court further instructed the jury (VII R. 43-44, 45):

> the government must prove that the defendant supplied the false or fraudulent information in his Form W-4, Employee Withholding Allowance Certificate, to his employers with the specific intent to interfere with the withholding and collection of his federal taxes in the manner prescribed by law.
>
> * * * * *
>
> In considering whether the defendant furnished false or fraudulent information to his employer, you should consider the defendant's entire communication to each employer, both spoken and written, not merely the Form W-4.

that petitioner was an individual "required to supply information to his employer under [26 U.S.C.] Section 3402 who willfully supplie[d] false or fraudulent information * * *."[6] Under 26 U.S.C. 3402(f)(2)(B), an employee is permitted to claim additional withholding allowances if his withholding status changes. However, that provision specifically states that the amount of allowances claimed "shall in no event exceed the number to which he is entitled on such day." See also 26 U.S.C. 3402(f)(2)(A).

The court of appeals therefore correctly approved the district court's instruction to the jury that the government was required to prove that petitioner had supplied false or fraudulent information to his employers "with the specific intent to interfere with the withholding and collection of his federal taxes in the manner prescribed by law" (VII R. 43-44). Accord: *United States* v. *Hinderman*, 528 F.2d 100, 102 (8th Cir. 1976); *United States* v. *Buttorff*, 572 F.2d 619, 626 (8th Cir.), cert. denied, 437 U.S. 906 (1978). See also *United States* v. *Smith*, 484 F.2d

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[6] Petitioner erroneously suggests (Pet. 6) that Treasury Regulations that permit an employer to reject a clearly false withholding exemption certificate submitted by an employee (Treasury Regulations, Section 31.3402(f)(2)-1(e) (26 C.F.R.)) support his claim that the government must also prove that the information supplied by the employe was capable of deceiving. While the Regulation could not have changed the statutory elements of the crime described in 26 U.S.C. 7205, it would, at all events, have no bearing on this case, where both of petitioner's employers accepted his Forms W-4 and acted upon his representations.

8, 10 (10th Cir. 1973), cert. denied, 415 U.S. 978 (1974).

United States v. *Snider*, 502 F.2d 645, 655 (4th Cir. 1974), upon which petitioner relies (Pet. 5-6), does not support his claim. In *Snider*, the defendant filed a Form W-4, claiming three billion allowances, accompanied by a letter to the Internal Revenue Service expressing his opposition to the manner in which the government spent his income tax payments. The court held as a matter of law that "[a] claim of '3 billion' [allowances] could deceive no one" (502 F.2d at 656). As the court found, such an obviously inflated claim was "purely symbolic" (*ibid.*). Thus, unlike this case, the employer in *Snider* disregarded the claim of three billion allowances and continued to collect withholding taxes (*id.* at 648). Indeed, subsequent to *Snider* the Fourth Circuit has held that the rule of that case is inapplicable to a false claim of 20 allowances on a Form W-4. *Shea* v. *United States*, 506 F.2d 1226, 1227-1228 (4th Cir. 1974). Accord: *United States* v. *Wellendorf*, 574 F.2d 1289 (5th Cir. 1978); *United States* v. *Arlt*, 567 F.2d 1295, 1298 (5th Cir. 1978); *United States* v. *Stephen*, 569 F.2d 860, 861 (5th Cir. 1978). The court of appeals therefore correctly concluded that *Snider* did not control this case.

2. Petitioner further argues (Pet. 7-12) that the district court erred in instructing the jury concerning the meaning of "willfulness" under 26 U.S.C. 7205.[1]

[1] The court instructed the jury as to willfulness as follows (VII R. 43-44, 45; emphasis supplied):

Although petitioner contends (Pet. 10-11) that the law with respect to a minister's claim of exemption from withholding taxes under 26 U.S.C. 3401(a)(9) is unclear, the court's instructions properly advised the jury that if it believed the petitioner's claim that he had been mistaken as to the requirements of the law he could not be convicted. Even on the assumption that the requirements for claiming a minister's withholding exemption are unclear, there was no justification for petitioner's knowing and willful filing of false or fraudulent Forms W-4. See *Bryson* v.

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent as the term applies means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids *purposely intending to violate the law.*
>
> That is to say in this case that the government must prove that the defendant supplied the false or fraudulent information in his Form W-4, Employee Withholding Allowance Certificate, to his employers with the specific intent to interfere with the withholding and collection of his federal taxes in the manner prescribed by law.
>
> Such intent may be determined from all the facts and circumstances surrounding the case. *An act or a failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.*
>
> * * * * *
>
> An act is willfully done if done voluntarily and intentionally and with the specific intent to do something which the actor knows the law forbids. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law. *An act intended in good faith to conform to the law is not willful.*

United States, 396 U.S. 64, 72 (1969). The court of appeals therefore correctly held (Pet. App. 5a) that the trial court's instructions fairly apprised the jury of the elements of the crime charged, including willfulness, in accordance with this Court's decision in *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 315055 284